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**Comments of Public Citizen Regarding 49
CFR Part 579: Reporting of Information
About Foreign Safety Recalls and
Campaigns Related to Potential Defects
66 Federal Register, October 11, 2001**

Introduction

Public Citizen believes the National Highway Traffic Safety Administration (NHTSA) has generally addressed the most important issues in its Notice of Proposed Rulemaking (NPRM) regarding reporting of information about foreign safety recalls and campaigns related to potential defects.

As NHTSA notes in the NPRM, failure by Ford Motor Company (Ford) and Bridgestone Firestone (Firestone) to notify NHTSA of foreign campaigns regarding tires which have since been shown to be defective on vehicles sold in the United States highlights the need for a clear statement of the intent of foreign reporting requirements. We completely disagree with the position taken by the agency last summer in interpreting its rule requiring copies of defect communications to dealers as inapplicable to U.S. manufacturer's communications with foreign dealerships concerning products identical to those sold in the U.S. We are grateful, therefore, that Congress acted to remedy the agency's error in this regard.

The obligation to report these campaigns to NHTSA has always existed under 49 U.S.C. 30166(f), as implemented by 49 CFR 573.8.; however, the harm caused by the agency's public statements of last summer misinterpreting the current rule merits a broad clarification of that rule by NHTSA. We are encouraged that the posture NHTSA has taken in its NPRM is in keeping with congressional intent, and hope that the final rule reflects a similar approach.

Historic authority

49 U.S.C. 30166(f), "Providing Copies of Communications About Defects and Noncompliance," states that:

A manufacturer shall give the Secretary of Transportation a true or representative copy of each communication to the manufacturer's dealers or to owners or purchasers of a motor vehicle or replacement equipment produced by the manufacturer about a defect or noncompliance with a

motor vehicle safety standard prescribed under this chapter in a vehicle or equipment that is sold or serviced.

To implement 49 U.S.C. 30166(f), NHTSA adopted 49 C.F.R. 573.8 (1995), which states:

Each manufacturer shall furnish to the NHTSA a copy of all notices, bulletins, and other communications (including those transmitted by computer, telefax or other electronic means, and including warranty and policy extension communiqués and product improvement bulletins), other than those required to be submitted pursuant to Sec. 573.5(c)(9), sent to more than one manufacturer, distributor, dealer, lessor, lessee, or purchaser, regarding any defect in its vehicles or items of equipment (including any failure or malfunction beyond normal deterioration in use, or any failure of performance, or any flaw or unintended deviation from design specifications), whether or not such defect is safety-related. Copies shall be in readable form and shall be submitted monthly, not more than five (5) working days after the end of each month.

NHTSA has suggested that this statute and regulation were limited in scope, noting in its NPRM of October 11 that “this regulation does not specifically address manufacturer communication about defects occurring in vehicles and equipment in use outside the United States.” While this is true, the regulation also does not exclude from reporting requirements any communication sent to dealers, etc., outside the United States. Therefore, any manufacturer operating in good faith and conducting an overseas campaign should have been compelled by the earlier version of the regulation to provide copies of their communications to NHTSA.

Sue Bailey, the former Administrator of the National Highway Traffic Safety Administration, stated in her comments to the House Commerce Committee that “there was no obligation for the manufacturer to provide information from outside the United States.”¹ This argument has also been made by the agency in communications to Public Citizen on the basis of concerns about “extraterritoriality,” or the claim that the United States did not have the authority to regulate manufacturer communications to foreign dealers concerning recalls or other campaigns.

The fact that Ford and Firestone chose not to report to NHTSA a clear case of a safety-related defect, concerning a product sold in the U.S., for which Ford was conducting at least six separate foreign campaigns highlights the fact that they were not acting in good faith. In addition, documents revealed in litigation clearly state that the legal division of Firestone maintained “reservations” regarding Ford’s customer notification program due to the concern that “U.S. DOT will have to notified.”² Public

¹ “Hearings before the Subcommittee on Telecommunications, Trade, and Consumer Protection and the Subcommittee on Oversight and Investigations of the Committee on Commerce House of Representatives,” One Hundred Sixth Congress, Second Session, Serial No. 106-165, p.74.

² *Id.* At 644 (Letter from Chuck Seilnacht of Ford Motor Company to Dave McKinnon of Ford).

Citizen believes that the current rulemaking should not imply that NHTSA is creating new reporting requirements. The agency is merely clarifying reporting requirements that have always existed, and yet have not always been followed.

This is further evidenced by the fact that automotive manufacturers, including Ford, have previously submitted to NHTSA communications with foreign dealers regarding products sold in the U.S. In a letter dated February 11, 1983, Roger E. Maugh of Ford wrote NHTSA to inform the agency of Ford's recall campaign taking place in Canada (Service Recall Number 458) to install additional reinforcements on their Escort and Lynx station wagons. Other manufacturers, including Honda, Volvo, Mazda and Alfa Romeo have submitted similar documents to the agency informing them of foreign campaigns.

We are anxious to see the agency exert its authority in this area and comment below regarding the specific ways that it has proposed to do so.

Comments on, and Recommended Clarifications of, Scope and Terms of Rule

The agency has formulated the current rulemaking in response to statutory language adopted as part of the TREAD Act and codified at 49 U.S.C. § 30166(l):

Reporting of defects in motor vehicles and products in foreign countries. (1)

Reporting of defects, manufacturer determination. Not later than 5 working days after determining to conduct a safety recall or other safety campaign in a foreign country on a motor vehicle or motor vehicle equipment that is identical or substantially similar to a motor vehicle or motor vehicle equipment offered for sale in the United States, the manufacturer shall report the determination to the Secretary.

Relationship to Early Warning Requirements

Public Citizen commends the agency's efforts to align the definitions used in the foreign recall reporting requirements with those in the separate but related proposed rule regarding "early warning" of manufacturer defects. In addition, we would like to emphasize that the agency should, as much as is practicable, merge information received through reporting under this rulemaking with the information that will become available to the agency as part of the "early warning" system. Maintaining two distinct data sets makes little sense given that the shared purpose of both sections is to alert the agency to the early and developing signs that a safety defect may exist.

Campaigns to be reported

The language used by NHTSA to define "other safety campaign" in the NPRM is confusing. The agency states that in an "other safety campaign" "a manufacturer would not necessarily make any acknowledgement, express or otherwise, that a safety problem existed." NHTSA then goes on to conclude that "a 'safety campaign' would be defined as an action in which a manufacturer communicates with owners and/or dealers with

respect to conditions under which a vehicle should be operated, repaired, or replaced, that relate to safety.”

In defining what reports a manufacturer must submit, we urge NHTSA to require submission of all reports that relate to a defect or potential defect, without relying on the manufacturer to determine whether a defect is safety-related. This proposal also would ameliorate any potential problem with overbreadth by narrowing the class of reportable communications, as it would ensure that any communication relates to a potential defect.

As the Ford/Firestone case demonstrates, manufacturers will not always act in good faith, even when a problem is clearly safety-related. Therefore, we would urge that “other safety campaign” be defined as an action in which a manufacturer communicates with owners and/or dealers with respect to conditions under which a vehicle should be operated, repaired, or replaced as a result of a defect or potential defect.

Public Citizen agrees with NHTSA’s proposal that manufacturers be required to report to NHTSA “whenever it has been notified that the government of a foreign country has determined that it should or must conduct a safety recall...whether or not the subject of the campaign would be a safety-related defect or noncompliance under U.S. law.” NHTSA should assume that all such recalls could be relevant and collect information about them in all cases.

Under no circumstances should this broad proviso be limited by any reliance on the regulatory scheme in operation in the foreign country at issue. Congress obviously never intended that reportable actions would be limited to an official “recall” in a foreign country, given that passage of the TREAD Act was occasioned by safety campaigns held in regions and countries, such as the Gulf Coast Countries, where no formal recall was conducted, and the authority under the Act, by its terms, is far broader than actions involving governmental actions by foreign officials.

“Substantially similar” parts and vehicles

It is clear that there is some disagreement over what constitutes a “substantially similar” part or vehicle for the purposes of reporting. Public Citizen is encouraged by the agency’s declaration that “the term ‘substantially similar’ sweeps with a broad brush and is not to be defeated by persons bent on finding or inventing distinctions to evade reporting.” We believe the term should be defined as broadly as possible, so as to limit the gray areas in which a manufacturer must exercise judgment over whether or not to report a campaign. Manufacturers should report campaigns involving substantially similar vehicles, even if the defective component or system is somewhat different from the component or system used or installed in the U.S.

In addition, this requirement should be broadly construed because the overall vehicle and individual components interact, and an alleged defect in one component or system might be related to broader design problems with a vehicle. Manufacturers should also report communications related to foreign campaigns in which the vehicle is

on a different platform or would otherwise not be considered similar, but the defective component or system is substantially similar to a component or system sold by that manufacturer in the U.S., because defects will be shared among such components.

We agree with NHTSA's observation that different foreign operating environments should not be a mitigating factor in determining reporting requirements – manufacturers can make their case as to why foreign conditions have affected the system or component in question, but the decision as to whether a safety defect exists or could exist in the U.S. should be left up to NHTSA.

Contents of notification

Public Citizen agrees with NHTSA's proposal to require companies to report the same information about foreign campaigns as they currently do for domestic campaigns, with two crucial additions: 1) the reason the foreign campaign was initiated; and 2) a comprehensive list of the vehicles and equipment sold in the U.S. that are identical or substantially similar to those being affected abroad. Providing English translations of all foreign documents (along with the original versions), as proposed by the agency, should also be a requirement. All of these reporting requirements are critical and should not be diminished in the final rule.

Timing

We agree that NHTSA should comply with the requirement specified in the Transportation Recall Enhancement, Accountability, and Documentation Act (TREAD), that foreign campaigns should be reported not later than 5 days after the decision to conduct them has been made. This is ample time for companies to compile the necessary information and submit it to the agency.

Submitted by:

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